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No. 86-1629

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

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511 DETROIT STREET, et al,

Petitioners,

v.

HON. FRANK J. KELLEY, In his official capacity as Attorney General, State of Michigan, et al,

Respondents.

and

DEQUINDRE BOOKS AND NEWS, INC, et al,

Petitioners,

v.

HON. FRANK J. KELLEY, et al,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT ATTORNEY GENERAL FRANK J. KELLEY IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

May a state meet the intractable obscenity problem by seeking to dry up the market for this material through higher fines on persons who, knowing the content and character of the material, disseminate obscene material for commercial gain at a business in which the dissemination of obscene material is a predominant and regular part of the business, and obscene material is a principal or substantial part of the stock in trade?

II.

Are the following terms unconstitutionally vague?

"Predominant and Regular".

"Principal or Substantial".

"Predominant and regular part of a person's business".

"Principal or substantial part of the stock in trade".

LIST OF PARTIES

The petitioners are four Michigan corporations that do not deny that some of the materials that they disseminate for commercial gain at their establishments may be obscene.

The respondents are the Attorney General of Michigan, and two of Michigan's county prosecutors.

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BRIEF OF RESPONDENT ATTORNEY GENERAL FRANK J. KELLEY IN OPPOSITION

Respondent Frank J. Kelley, Attorney General of the State of Michigan, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case reported at 807 F2d 1293 (1986).

STATEMENT OF THE CASE

Petitioners are businesses "who never deny that some of their retailed items may be obscene" (Pet. p B-4). They do business from stores that advertise "adult books" or "peep shows", or they advertise that they sell "love products", or they advertise "female models", "escort service" or "adult movies". The buildings are so constructed, or their windows are so located or blocked, that an outside observer cannot see what is inside. They restrict entry to those who are 18 or older.

There is no issue in this case of the meaning of "obscenity" (Pet. p 4 and p C-4), or whether disseminated materials are "obscene" (Pet. p B-4).

Two months before the March 29, 1985 effective date of Michigan's new anti-obscenity law, these businesses sought an injunction against the "first degree obscenity" portion of the law (MCL 752.365; MSA 28.579(365); (Pet. p E-5)), because they claimed that they could not determine how much obscene material they could carry in their businesses before they were subject to the higher criminal misdemeanor fines of the "first degree" portion of the law. They made no complaint of the "second degree obscenity" portion of the law that included a criminal misdemeanor fine for dissemination to the public for commercial gain of any obscene material when the disseminator knows the content and character of the material. MCL 752.366; MSA 28.579(366); (Pet. p E-6).

The first degree obscenity portion of the law includes the same wording as the second degree obscenity portion, but with additional wording to make the higher penalties applicable only to those whose businesses also have the dissemination of obscene material as a "predominant and regular part of the person's business", and that have

obscene material as "a principal or substantial part of the stock in trade." MCL 752.365; MSA 28.579(365); (Pet. p E-5).

The only individual subject to the criminal penalties of the law is one who has "discretion with regard to that dissemination [of obscene material] or is ... involved in the management of the employer." MCL 752.367(b); MSA 28.579(367)(b); (Pet. pp E-6 to E-7).

The stated purpose of the Michigan Legislature in setting forth higher criminal misdemeanor fines for "first degree obscenity" is to make obscenity unprofitable. The Michigan Senate Analysis Section Analysis dated December 13, 1984, stated:

> "The bill would provide for fines for the dissemination of obscene material that reflect the billions of dollars at stake in the pornography business. Imposition of a fine of a few thousand dollars on an entrepreneur who may be making millions each year is only a slap on the wrist. The best way to curtail dissemination of pornography is to make it unprofitable, hence the bill's provisions for fines of up to $5 million."

The District court "compliment[ed] plaintiffs' attorneys on the high professional quality of their presentation and argument" and "merely paraphrase[d] the points appropriately made by plaintiffs" (Pet. p B-3); finding the "first degree obscenity" portion of the law vague and overbroad and a prior restraint. (Pet. p B-12). The Sixth Circuit reversed and remanded, saying on the issue of vagueness that

> "plaintiffs do not appear to have a problem determining when their conduct is criminal, but they complain that they cannot determine

with sufficient precision just how criminal it is." 807 F2d at 1295; (Pet. p A-6).

The Sixth Circuit pointed out that the words and terms challenged by the disseminators of obscene materials "are found throughout civil and criminal codes and throughout reported cases" (807 F2d at 1296; (Pet. p A-8)), and "are within the understanding [of] ordinary people." 807 F2d at 1296; (Pet. p A-8).

The Sixth Circuit also recognized that an enforcement official must prove all the elements of the "second degree obscenity" offense; and, in addition, must prove the additional elements of "the first degree obscenity" offense, holding that this does not encourage arbitrary or discriminatory enforcement. 807 F2d at 1297; (Pet. p A-9). On the issue of overbreadth, the Sixth Circuit pointed out that a sentencing judge may consider the business's total profits in determining an appropriate fine, and that a fine is not limited to amounts derived from the dissemination of obscene materials only. 807 F2d at 1297 and 1299; (Pet. pp A-9 to A-10; Pet. p A-13).

Because it was very close to the approved language in *Mishkin* v *New York*, 383 US 502, 510 (1966), the Sixth Circuit found Constitutional the law's scienter requirement of knowledge of "the content and character of the material", that is, "general knowledge or reason to know, or a belief or ground for belief which warrants further inspection or inquiry, of the nature and character of the material involved". (MCL 752.362(3), sentence 1; MSA 28.579(362)(3), sentence 1; (Pet. p E-2)). 807 F2d at 1297; (Pet. pp A-10 to A-11).

The succeeding language in the second sentence of MCL 752.362(3); MSA 28.579(362)(3); (Pet pp E-2

to E-3), that defined when a person had such knowledge, "troubled" the Sixth Circuit (807 F2d at 1298, (Pet. p A-11)), but the Sixth Circuit "decline[d] to determine the facial constitutionality of this language in advance of its application and construction by the Michigan courts." 807 F2d at 1298; (Pet. p A-13). The case was "remand[ed] to the District Court for proceedings consistent with this opinion." 807 F2d at 1299; (Pet. p A-14).

Counsel for the petitioners would not concur with a suggestion for certification to the Michigan Supreme Court when, after remand, concurrence was verbally sought under the local rule of the District Court. Counsel has yet to respond to respondent Michigan Attorney General Kelley's written suggestion to the District court for certification to the Michigan Supreme Court.

The Sixth Circuit also held that the large potential fine for a "first degree obscenity" conviction did not act as a prior restraint; saying:

> "[W]e find no case law to support the notion that a fine for illegal activity cannot be paid from lawfully obtained money, even where that lawfully obtained money is the result of disseminating protected expression." 807 F2d at 1299; (Pet. p A-14).

Petitioners' petition for rehearing and suggestion for rehearing *en banc* were denied. (Pet. p D-1). Petitioners' petition for writ of certiorari followed. Petitioners never sought a stay of the Sixth Circuit's mandate, either before or after it was issued on February 26, 1987.

REASONS FOR DENYING THE WRIT

I

THE TERMS USED TO DISTINGUISH MICHIGAN'S FIRST DEGREE OBSCENITY FROM SECOND DEGREE OBSCENITY CONVEY SUFFICIENTLY DEFINITE WARNING AS TO THE PROSCRIBED CONDUCT WHEN MEASURED BY COMMON UNDERSTANDING AND PRACTICES, AND GIVE ADEQUATE WARNING OF THE CONDUCT PROSCRIBED.

In seeking to meet what this Court has called "'the intractable obscenity problem'", *New York* v *Ferber*, 458 US 747, 754 (1982), the State of Michigan has chosen to try to "dry up the market for this material", *New York* v *Ferber*, 458 US 747, 760 (1982), by permitting heavier fines to be imposed upon conviction of those "persons" for whom the dissemination of obscene material is

> "a predominant ... part of the person's business",
>
> and
>
> "a regular part of the person's business",
>
> and
>
> "a principal or substantial part of the stock in trade".
>
> MCL 752.365(1); MSA 28.579(365)(1); (Pet. p E-5).

Petitioners complain at pages 11-12 that these terms are vague. The Sixth Circuit correctly stated that "the challenged terms are found throughout civil and criminal codes, and throughout reported cases" (807 F2d at 1296; (Pet.

p A-8)), and that ordinary people can understand what conduct is prohibited. 807 F2d at 1295-1296; (Pet. pp A-7 to A-8).

Some examples of where those terms (or their components) are found and/or discussed are:

"Principal or substantial part of the stock in trade":

Nortown Theatre Inc v *Gribbs*, 373 F Supp 363, 367 (ED Mich, 1974), (adult motion picture theatre zoning), *aff'd sub nom*, *Young* v *American Mini Theatres, Inc*, 427 US 50 (1976).

15192 Thirteen Mile Road v *City of Warren*, 626 F Supp 803, 820-821 (ED Mich, 1985), (adult bookstore zoning).

Strand Property Corp v *Municipal Court*, 148 Cal App 3d 882, 889-890, 200 Cal Rptr 47, 51 (4th Dist 1983), (adult motion picture theater zoning).

Kuhns v *Santa Cruz County Board of Supervisors*, 128 Cal App 3d 369, 376, 181 Cal Rptr 1, 4 (4th Dist 1982), (adult bookstore zoning).

42 USC §2000a(c)(1982).

Webster's Third New International Dictionary pp 1802, 2247, 2280 (Unabridged 1976 ed).

83 CJS pp 97-98 (1953).

N.C. Gen. Stat. §19-1.2.(4)(1983).

"Predominant and regular part of the business":

Hart Book Stores, Inc v *Edminsten*, 612 F2d 821, 834 (4th Cir 1979), (limiting location of "adult establishment").

Webster's Third New International Dictionary pp 302, 1786, 1913 (Unabridged 1976 ed).

12A CJS pp 470 (1980).

76 CJS pp 608-609 (1952).

N.C. Gen Stat §19-1.2.(1)(1983).

See:
Brockett v *Spokane Arcades, Inc*, 472 US 491, 493 (1985).

State v *Chateau X*, 296 NC 251, 257; 250 SE2d 603, 607 (1979), *readopted after being vacated and remanded* from U.S. Supreme Court (445 US 947 (1980)), 302 NC 321; 275 SE2d 443 (1981).

Fehlharber v *North Carolina*, 675 F2d 1365, 1367 (4th Cir 1982).

This language in the Michigan statute is at least as definite as that in many other criminal statutes which this Court has upheld against a charge of vagueness.

See, e.g., the list in *United States* v *Harriss*, 347 US 612, 624 fn 15 (1954);

and

Jordan v *DeGeorge*, 341 US 223, 231 fn 15 (1951).

II

THERE IS NO BASIS FOR PETITIONERS' ARGUMENT CONCERNING A LACK OF A SCIENTER REQUIREMENT.

Petitioners' argument at pg 14 that there is no scienter requirement for all of the first degree obscenity section of the Michigan statute is totally without substance.

The section requires a knowledge of "the content and character of the material", and the special requirements of the first degree obscenity section are all related to the "material", i.e.

> "if dissemination of obscene material [of which the 'person' knows the content and character] is a predominant and regular part of the person's business...".
>
> "if obscene materials [of which the 'person' knows the content and character] are a principal or substantial part of the stock in trade ...".
> MCL 752.365(1); MSA 28.579(365)(1);
> (Pet. p E-5)).

The legislative history clearly states that "For either first or second degree obscenity the person would have to know the content and character of the material." The Michigan Senate Analysis Section Analysis, dated December 13, 1984, says:

> "A person would be guilty of obscenity in the first degree when he or she disseminated ... any obscene material if dissemination of obscene material was a 'predominant and regular part of the person's business at a particular ... establishment and if obscene materials were a 'principal or substantial

> part' of the stock in trade at that establishment .... For either first or second degree obscenity, the person would have to know the content and character of the material."

Further, Michigan law limits criminal prosecution under its obscenity law to the following "persons".

> "an individual, or a sole proprietorship, partnership, corporation, or other legal entity, or an agent or servant of an individual or legal entity." MCL 752.363(1); MSA 28.579(363)(1); (Pet. p E-4).

But the only individuals who may be prosecuted are those who have discretion with regard to the dissemination of obscene material or those who are involved in the management of the employer. MCL 752.367(b); MSA 28.579(367)(b); (Pet. pp E-6 to E-7).

In addition, only "persons" who disseminate for commercial gain are subject to criminal prosecution. MCL 752.362(2); MSA 28.579(362)(2); (Pet. p E-2).

Considering the narrow list of those who are subject to criminal prosecution, and the nature of their relationship to the business, the following statement of the New York Court of Appeals is particularly applicable:

> "[N]o merchant, regardless of the size and scope of his inventory, can survive economically unless he knows his stock."
>
> *People* v *Kirkpatrick*, 343 NYS2d 70, 77, 32 NY2d 17, 25, 295 NE2d 753, 758 (1973), (Bookseller promoting obscene material),

appeal dismissed for want of a substantial federal question, sub nom Kirkpatrick v *New York*, 414 US 948 (1973).

Considering the wording of the Section; the Legislative intent; and since Michigan's first degree obscenity section only applies to a legal entity, or to an individual who has discretion with regard to dissemination of obscene material or is involved in the management of the employer, and, even then only applies to those "persons" when disseminating for commercial gain for business at a particular establishment; the argument of a lack of scienter would seem to evaporate.

III

THE FOCUS OF MICHIGAN'S FIRST DEGREE OBSCENITY SECTION IS ON THE OBSCENE MATERIALS THEMSELVES RATHER THAN ON THE PLACE FROM WHICH THE MATERIAL IS SOLD.

Petitioners on page 13 unsuccessfully try to distinguish Michigan's first degree obscenity section from its second degree obscenity section by claiming that the first degree obscenity section accents "place", while the second degree obscenity section does not, and thus puts a burden on protected materials.

Both the first degree obscenity and second degree obscenity sections punish the dissemination of obscene material. MCL 752.365; MSA 28.579(365); (Pet. p E-5); MCL 752.366; MSA 28.579(366); (Pet. p E-6). "Disseminate" means to manufacture, sell, etc. to the public "for commercial gain". MCL 752.362(2); MSA 28.579(362)(2); (Pet. p E-2).

What petitioners are trying to do is equate Michigan's first degree obscenity section with nuisance laws that were found to be unconstitutional because those nuisance laws permitted the closing of a theater or a bookstore after it had been determined that substantially all of the magazines or films exhibited there were obscene.

> *J. R. Distributors* v *Elkenberry*, 725 F2d 482, 494 (9th Cir, 1984), *reversed and remanded, sub nom, Brockett* v *Spokane Arcades*, 472 US 491 (1985).
>
> *People ex rel Busch* v *Projection Room Theater*, 17 Cal3d 42, 58-59, 130 Cal Rptr 328, 337-338, 550 P2d 600, 609-610 (1976), *cert denied, sub nom Van de Kamp* v *Projection Room Theater*, 429 US 922 (1976).

The Sixth Circuit ignored this argument for good reason; Michigan's statute is not a nuisance statute directed against a place, rather it is a criminal statute directed toward a "person". MCL 725.365; MSA 28.579(365); (Pet. p E-5).

There is absolutely nothing in the Michigan statute directed toward a "place". The focus always remains on the dissemination of the obscene materials themselves.

IV

MICHIGAN'S FIRST DEGREE OBSCENITY SECTION ENHANCES THE AVAILABILITY AND DISSEMINATION OF CONSTITUTIONALLY PROTECTED MATERIALS.

Petitioners' argument on pages 17-23 that the heavier fines of the first degree obscenity section will be ruinous to those who wish to

disseminate protected materials ignores the bedrock of the complaint by the petitioners: The petitioners claim they do now know how much obscene material they may carry in their businesses before they are subjected to the higher fines.

Nothing happens to any "person" until a jury of a defendant's peers unanimously finds that a prosecutor has proved beyond a reasonable doubt

> that the defendant disseminated (or possessed with intent to disseminate) obscene material; and
>
> that the defendant knew the content and character of the material; and
>
> that dissemination of obscene material is a predominant part of the defendant's business at a particular establishment; and
>
> that dissemination of obscene material is a regular part of the defendant's business at that particular establishment; and
>
> that the principal or substantial part of the stock in trade at that establishment is obscene material. MCL 752.365(1); MSA 28.579(365)(1); (Pet. p E-5).

The penalty for a first offense ranges

> From no imprisonment up to imprisonment for not more than 1 year.
> MCL 752.365(2); MSA 28.579(365)(2); (Pet. p E-5);
>
> and/or
>
> From no fine, up to a fine of not more than $100,000.

MCL 752.365(2); MSA 28.579(365)(2); (Pet. p E-5).

The penalty for a first offense could even be a simple warning.

The heavier fine of which petitioners express such alarm can come only after another jury of a defendant's peers unanimously finds that these same elements have been proved beyond a reasonable doubt for a second time. MCL 752.365(3); MSA 28.579(365)(3); (Pet. p E-5).

Respondent submits that a person, who has once been convicted, would not chance a second conviction unless the money to be made is so enormous that the person is quite willing to continue to maintain a principal or substantial part of the stock in obscene material, to continue to have dissemination of obscene material a regular part of the business, and to continue to have dissemination of obscene material a predominant part of the business.

It is suggested that a lot of money is the real motivation. Therefore, deterring this money motivation is the real and effective solution. In other words, Michigan has said that if you are found guilty a second time, we are going to hit you hard in the pocketbook.

To avoid prosecution under Michigan's first degree obscenity section; one need only increase Constitutionally protected materials so that they are the principal or substantial part of the stock in trade; or make the dissemination of Constitutionally protected materials the predominant part of the business; or make the dissemination of Constitutionally protected materials the regular part of the business.

V

THERE IS A RATIONAL BASIS FOR MICHIGAN'S CLASSIFICATION OF PERSONS WHO DISSEMINATE OBSCENE MATERIAL FOR COMMERCIAL GAIN.

Petitioners do not complain of Michigan's definition of "obscene", (Pet. p 4 and p C-4); nor do they deny that some of the materials they disseminate for commercial gain may be obscene. (Pet. p B-4).

Petitioners argue on pages 21-23 of their petition that Michigan's differential treatment between first degree obscenity violators and second degree obscenity violators is a denial of equal protection.

Michigan's obscenity law concerns the prosecution of disseminators for commercial gain of obscene materials.

> "A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationshp to a legitimate public purpose."
>
> *Plyer* v *Doe*, 457 US 202, 216 (1982).
>
> *See*: Note: 100 Harv L Rev 1146 (1987).

As appears in the Michigan Senate Analysis Section Analysis dated December 13, 1984, the

purpose of Michigan's anti-obscenity legislation is to dry up the market for obscenity by making it unprofitable, a valid purpose recognized by this Court in *New York* v *Ferber*, 458 US 747, 760 (1982). This purpose is shown by the added conditions that distinguish Michigan's first degree obscenity section from its second degree obscenity section. Michigan's first degree obscenity section is aimed at those who specialize in obscenity as the major business activity. Included in those who may be covered by the first degree obscenity section are those distributors and warehouse persons for whom obscene materials are a predominant and regular part of their business, and who have obscene materials as a principal or substantial part of their stock in trade.

The Michigan Legislature's attempt to dry up the market for obscenity being a rational basis for the challenged classification, there is no breach of the Equal Protection Clause.

CONCLUSION

For reasons stated in this brief, Respondent Michigan Attorney General Frank J. Kelley respectfully requests that this Court deny the petition for certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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